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UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO/OAKLAND DIVISION

Meredith R. BROWN; Jorge RODRIGUEZ-CHOI; Lizz CANNON; Kelly RYAN; Jeri FLYNN; Arturo DOMINGUEZ COBOS; Isidro de Jesus RODRIGUEZ SANCHEZ; Nelida ORNELAS RENTERIA; Manuel CRUZ RENDON; Orlanda URBINA; Juan de DIOS CRUZ ROJAS; Maria de Jesus CALDERON RUIZ; Cristina Lucero RAMIREZ; Carolina CASTOR-LARA; Efren ESCOBEDO; Delmy GONZALEZ-ORDENEZ; Artemio Alejandro PICHARDO-DELGADO; and Farook ASRALI,

Plaintiffs,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION; and DEPARTMENT OF HOMELAND SECURITY,

Defendants.

Case No. 4:15-cv-01181-JD

Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint

Date: July 8, 2015
Time: 10:00 a.m.
Before: Hon. James Donato
San Francisco Courthouse, Courtroom 11

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I. INTRODUCTION

The Court should deny Defendants' Motion to Dismiss (ECF 26) based on Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). This Court has subject matter jurisdiction over the pending action because the Freedom of Information Act ("FOIA") creates a cause of action in district court for requests that have been pending for more than 20 business days and Plaintiffs have constructively exhausted their administrative remedies. 5 U.S.C. §§ 552(a)(6)(A)(i) and (C)(i). Both the Non-attorney and Attorney Plaintiffs have standing to raise their claims that Defendant U.S. Customs and Border Protection's ("CBP") has a pattern and practice of failing to timely respond to FOIA requests. The Court also has authority to grant equitable relief.

II. STATEMENT OF RELEVANT FACTS

FOIA requires that an agency respond to a FOIA request within 20 business days. 5 U.S.C. § 552(a)(6)(A)(i). Despite this mandate, CBP routinely fails to respond to FOIA requests within the statutory period and CBP's FOIA backlog is staggering. At the close of fiscal year ("FY") 2014, CBP had 34,307 FOIA requests that had been pending for more than 20 business days.[1] The FY 2014 backlog was only approximately ten percent lower than that of the last fiscal year, FY 2013, when it was 37,848.[2]

Plaintiffs are five immigration attorneys and thirteen noncitizens who filed FOIA requests with CBP. As alleged in the First Amended Complaint (FAC) (ECF 22), the immigration attorneys routinely file FOIA requests on behalf of their noncitizen clients in order to adequately advise and represent them, defend them against removal from the United States, and apply for affirmative immigration benefits on their behalf, such as applications for lawful permanent

[1] Second Declaration of Stacy Tolchin in Support of FAC ("Second Tolchin Dec.") at Exh. F, Department of Homeland Security, Privacy Office, 2014 Freedom of Information Act Report to the Attorney General of the United States ("Exh. F") at 19.

[2] Second Tolchin Dec. at Exh. F at 19.

resident status.[3] The individual noncitizen Plaintiffs have filed FOIA requests with CBP and require a response to determine, inter alia, if they are eligible to apply for lawful permanent resident status. Their requests have been pending for periods ranging from five to twenty-five months—all dramatically in excess of the statutory 20 business days permitted by FOIA.

III. ARGUMENT

A. Standard for a Motion to Dismiss

In a motion to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of establishing subject matter jurisdiction. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). A motion to dismiss may be a facial or factual attack. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." Id. A factual attack involves disputes over the "truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Id. A Rule 12(b)(6) motion challenges the sufficiency of a complaint as failing to allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A facial plausibility standard is not a "probability requirement" but mandates "more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotations and citations omitted). "[D]ismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Johnson v. Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008) (internal quotations and citations omitted). For purposes of ruling on both Rules 12(b)(1) and 12(b)(6) motions, the court must accept the factual allegations in the complaint as true. Miranda v. Reno, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001) (12(b)(1) motion); Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th

[3] See ECF 22 at ¶ ¶ 5, 68.

Cir. 2008) (12(b)(6) motion). The exhibits attached to the complaint are part of the complaint "for all purposes." Fed. R. Civ. P. 10(c).

B. FOIA Creates a Cause of Action for Requests That Have Been Pending for More Than 20 Business Days.

Defendants erroneously claim there is no cause of action for FOIA requests that have been pending for more than 20 business days. ECF 26 at 3. Both FOIA and cases interpreting it foreclose this argument. Indeed, Congress authorized such a cause of action in creating 5 U.S.C. § 552(a)(6)(A)(i), which states that an agency must provide a "determination" with respect to a FOIA request within twenty business days of receipt. The statute provides that a suit may be brought in district court and that the court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Further, while exhaustion before the agency is required before a lawsuit is filed, a request is considered to be constructively exhausted if—as in the case of all Plaintiffs—there is no timely response. 5 U.S.C. § 552(a)(6)(C)(i). "In setting a time limit for agencies to respond to initial requests and establishing constructive exhaustion as a means to enforce that limit, Congress expressed a clear intent to ensure that FOIA requests receive prompt attention …." Coleman v. Drug Enforcement Admin., 714 F.3d 816, 824 (4th Cir. 2013). As such, courts recognize that the failure to timely respond to a FOIA request constitutes a "withholding" of the requested information and thus is a basis for pursuing an action in district court. See e.g. Gilmore v. U.S. Dep't of Energy, 33 F. Supp. 2d 1184, 1187 (N.D. Cal. 1998) ("All of this strongly suggests that an agency's failure to comply with the FOIA's time limits is, by itself, a violation of the FOIA, and is an improper withholding of the requested documents."). Thus, Defendants err in implying that there was no "withholding" in the Plaintiffs' cases. ECF 26 at 4. As the failure to timely respond to a request also constitutes a constructive denial, Plaintiffs

may proceed directly to district court.[4]

C. The Court Has Authority to Grant Relief Where Defendants Engaged in a Pattern or Practice of Failing to Timely Respond to FOIA Requests.

Plaintiffs claim that CBP routinely fails to timely respond to FOIA requests, and has a pattern and practice of doing so with the vast majority of FOIA requests that it receives. ECF 22 at ¶¶ 3, 41, 91, 99. Plaintiffs' claim turns on whether CBP's pattern and practice of routinely failing to timely respond, which increases its already enormous backlog, constitutes a systemic violation of 5 U.S.C. § 552(a)(6)(A)(i) warranting class action relief. Contrary to Defendants' contentions in its Motion to Dismiss, Plaintiffs have stated a cause of action upon which this Court can grant relief for several reasons: first, the Supreme Court has held that § 552(a) vests district courts with jurisdiction to fashion broad equitable relief; second, individual FOIA actions are not an adequate alternative remedy; and, third, systemic relief is manageable and comports with the purpose and intent of FOIA. Accordingly, Plaintiffs plausibly have set forth their claim and the Court should deny the Motion to Dismiss. See Ashcroft v. Iqbal, 556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (citation omitted).

1. Through 5 U.S.C. § 552(a), Congress Expressly Vested District Courts with Jurisdiction to Fashion Broad, Equitable Relief.

The plain language of FOIA, as interpreted by the federal courts, including the Supreme Court, indicates that this Court can grant Plaintiffs the relief they are seeking. As discussed in §

[4] Further, Congress specifically provided district courts with the authority to monitor an agency's progress in the limited situation in which the agency has affirmatively demonstrated that exceptional circumstances caused the delay. 5 U.S.C. § 552(a)(6)(C)(i). Defendants have not attempted to make such a showing here; even if they had, resolution of this issue is not appropriate in a motion to dismiss. When § 552(a)(6)(C)(i) is invoked, the Court retains jurisdiction over the claim. Id. ("[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.").

III.B above, government agencies must timely make materials available to the public unless the statute specifically exempts the materials from disclosure. See 5 U.S.C. §§ 552(a), (b). Significantly, however, FOIA vests district courts with broad, equitable powers to review pattern and practice claims and enforce the terms of the statute. See, e.g., Mayock v. Nelson, 938 F.2d 1006, 1006 (9th Cir. 1991) (affirming jurisdiction over claim that former immigration service had a pattern and practice of failing to produce certain categories of documents and violating the statutory time limits for processing requests); Payne Enter., Inc. v. United States,837 F.2d 486, 491 (D.C. Cir. 1988) (finding plaintiffs' claim was not moot even though it obtained results of an individual FOIA request where the Air Force engaged in an impermissible practice in evaluating FOIA requests); Gilmore, 33 F. Supp. 2d at 1187 (finding jurisdiction over claim that Department of Energy has a pattern and practice of untimely responding to FOIA requests).

Despite Defendants' repeated assertions otherwise (ECF 26 at 2, 4-6), this Court possesses equitable authority that extends beyond simply challenging privileges that are asserted to withhold specific documents, and ordering their production. In Renegotiation Board v. Bannercraft Clothing Co., Inc., et al., defense contractors sued the federal agency responsible for eliminating excessive profits from defense contracts, the Renegotiation Board (RB), seeking to enjoin it both from withholding documents relevant to contract renegotiations and from conducting further renegotiation proceedings until RB produced the documents. 415 U.S. 1, 6 (1974). The district court held, and the D.C. Circuit affirmed, that FOIA conferred jurisdiction both to order RB to produce documents and to enjoin it from conducting further proceedings. Id. at 9. At issue before the Supreme Court was "whether the FOIA authorizes a district court to enjoin Renegotiation Board proceedings until the court determines that the contractor is or is not entitled to information it claims under the FOIA." 415 U.S. at 16-17. The Supreme Court held that, although FOIA does not expressly authorize injunctions of agency proceedings, it also does not limit a district court's equitable authority to enforce the statute's terms, including enjoining

the administrative proceedings at issue in that case. Id. at 20-21 ("With the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court."). The Court reasoned that its conclusion was supported by the "broad language of the FOIA statute," "the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do," and the district court's role as the "enforcement arm" of FOIA. Id.

Indeed, since Bannercraft Clothing Co., several courts similarly have ordered injunctive relief to enforce the terms of FOIA. See, e.g., Long v. U.S. Internal Revenue Service et al., 693 F.2d 907, 909-10 (9th Cir. 1982) (reversing the denial of prospective injunction seeking to prohibit the IRS from continuing its unlawful practice of withholding and delaying disclosure of non-exempt documents and instructing district court to draft an injunction to "insure against lengthy delays in the future"); Payne Enterprises, Inc. v. United States et al., 837 F.2d at 495 (instructing district court to grant declaratory relief on remand and to consider the propriety of future injunctive relief to remedy the Air Force's repeated practice of refusing to release bid abstracts in violation of FOIA).

Just as in Bannercraft Clothing Co. and the other aforementioned cases, § 552(a) likewise creates a cause of action and vests this Court with equitable authority to declare unlawful CBP's pattern and practice of violating FOIA's time limits, to order the agency to clear its backlog, and to enjoin it from future violations. See, e.g., Gilmore , 33 F. Supp. 2d at 1187. Defendants ignore this precedent and, instead, relying heavily on Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n ("CREW"), 711 F.3d 180, 189 (D.C. Cir. 2013), argue that the Court's authority under FOIA is limited to resolving disputes about exemptions that the agency has asserted to withhold specific documents and, where appropriate, ordering production. ECF 26 at 4-5. The CREW decision, however, is entirely inapposite.

The *only* issue before the D.C. Circuit in CREW was "what kind of agency response qualifies as a 'determination'" under FOIA before a requestor may sue in federal court. CREW, 711 F.3d at 182; see also id. at 185 ("But what constitutes a 'determination' so as to trigger the exhaustion requirement? That is the critical question here.").[5] In answering that particular question, the circuit defined an agency "determination" for purposes of exhaustion and concluded that the absence of such determination within the statutorily prescribed time period penalizes the agency in that it "cannot rely on the administrative exhaustion requirement to keep cases from getting into court." Id. at 189-190. The D.C. Circuit did not hold that forfeiting an exhaustion defense was the *only* penalty the agency faces for failure to abide by the terms of FOIA. Indeed, in addition to not considering the viability of a pattern and practice cause of action under § 552(a) (see n.5, supra), the CREW court in no way suggested that it was overruling, attempting to overrule, or distinguishing Bannercraft Clothing Co., Long, or other similar cases.

2. Individual FOIA Actions Are Not An Adequate Alternative Remedy.

Defendants incorrectly assert that individual FOIA lawsuits can resolve CBP's repeated practice of violating FOIA's statutory time limits (which, as Plaintiffs' allege and DHS' statistics evince, CBP will continue to violate years into the future, absent an order from this Court). See ECF 26 at 7-8. Defendants effectively claim that the roughly 34,307 individuals whose FOIA requests are part of CBP's backlog,[6] should flood the district courts with individual lawsuits to allow for "judicial supervision over their specific requests." ECF 26 at 8. Not only does this assertion run contrary to the purpose of Federal Rule of Civil Procedure 23 and class action

[5] As such, the viability of a cause of action seeking relief from a pattern and practice of violating FOIA was not presented to, or decided by, that court. Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents") (citations omitted).

[6] Second Tolchin Dec., Exh. F at 4, 19.

litigation in general, it also ignores the fact that individualized lawsuits cannot remedy the larger, ongoing, and persistent violation of FOIA's time limits.

The Supreme Court's decision in McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) is instructive on this point. In McNary, the Court affirmed the district court's jurisdiction to adjudicate noncitizens' pattern and practice claims, notwithstanding the availability of judicial review of individual amnesty denials. McNary, 498 U.S. at 498-99. The Court reasoned that: (1) the judicial review statute referenced review of a "single act rather than a group of decisions or a practice or procedure employed in making decisions," id. at 492; (2) if Congress had intended the judicial review statute to preclude challenges to agency "procedures and practices, it could easily have used broader statutory language," id. at 494; (3) the noncitizens "would not as a practical matter be able to obtain meaningful judicial review of their application denials or of their objections to INS procedures" in individual actions because such actions are "almost always confined to the record made in the proceeding at the initial decisionmaking level" and most of the evidence showing unfairness in the agency practices "would have been irrelevant" in such actions, Id. at 497; and (4) the court of appeals "would lack the factfinding and record-developing capabilities of a federal district court," Id. at 497.

Likewise here, FOIA—as interpreted by the Supreme Court and other courts, see § III.C.1, supra—is broad and individual actions would not meaningfully resolve Plaintiffs' "pattern and practice" claim against CBP. Defendants admit as much, acknowledging that an individual action involves "concrete factual situations that pertain to specific FOIA requests." ECF 26 at 7. For future requestors seeking to compel CBP to comply with the statutory time limits, an individual lawsuit necessarily requires waiting until CBP violates the statute before the requestor can file suit; i.e., he or she must wait for the very violation Plaintiffs seek to enjoin (noncompliance with the deadline) to occur before the suit can be filed. For requestors whose

requests are lost in CBP's backlog, an individual action may eliminate one of 34,307 backlogged cases, but has no effect whatsoever on the other 34,306 cases lingering in the backlog.

Had Congress wanted § 552 to preclude challenges to repeated agency violations of FOIA, it knew how to do so. See Bannercraft Clothing Co., 415 U.S. at 19. Additionally, in an individual § 552(a) action, because the district court's reach is limited to the specific request at issue in that case, the record and the court's factfinding ability necessarily also are limited. Finally, to the extent that the McNary Court found that the "factfinding and record-developing capabilities" of the district court rendered it most suitable for adjudication of pattern and practice claims, these same qualities favor adjudication of Plaintiffs' claim by this Court. Indeed, unlike the statutory scheme examined in McNary, under FOIA there is no statutory language purporting to limit judicial review. Thus, Defendants have even less cause to assert that a class challenge under FOIA is inappropriate. Hence, the Court should reject Defendants' position that no court has jurisdiction to decide whether CBP is engaged in a pattern and practice of violating FOIA.

3. Systemic Relief is Manageable and Comports with the Purpose and Intent of FOIA.

Defendants allege that Plaintiffs' claim is subject to Rule 12 dismissal because CBP would have difficulty implementing the requested relief, which, quite simply, requires compliance with the letter and spirit of FOIA to timely process both backlogged and future FOIA requests. Defendants dramatically allege that this requested relief is an "impractical possibility" and places "federal agencies" "in an impossible situation," even though the only agency that would be affected is CBP. ECF 26 at 6-7. Practically speaking, however, the Court should recognize that CBP is responsible for allowing its backlog to grow exponentially over the last few years. ECF 22 at ¶¶ 4-5, 32-42. This is true even though CBP has significantly more funding than U.S. Citizenship and Immigration Services and U.S. Immigration and Customs Enforcement, its two counterpart agencies within DHS. ECF 22 at ¶6. Indeed, as one of the largest and most well-

funded agencies, Defendants cannot seriously claim "limited resources" or that an order from this court would cause CBP to "second-guess" its management of "competing priorities," ECF 26 at 7. Indeed, CBP's enormous backlog clearly demonstrates that complying with FOIA and processing FOIA requests simply are not among CBP priorities.

Furthermore, nothing about Plaintiffs' request for declaratory or injunctive relief "would make hash of FOIA's remedial structure and contradict the statute's clear intent." ECF 26 at 7. In enacting FOIA, Congress recognized:

> [I]nformation is often useful only if it is timely. Thus, excessive delay by the agency in its response is often tantamount to denial. It is the intent of this bill that the affected agencies be required to respond to inquiries and administrative appeals within specific time limits.

Gilmore, 33 F. Supp. 2d at 1187 (quoting H. Rep. No. 876, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. Admin. News 6267 at 6271). Congress echoed this sentiment over twenty years later in 1996 when it amended FOIA, inter alia, to extend the time limits for responding to FOIAs from ten days to twenty days. Id. ("Allowing agencies more time to respond to FOIA requests thus appears to have been a policy decision by Congress to provide more realistic time limits in order to secure more widespread compliance with those limits."). Thus, the clear intent of Congress in enacting the time limits in FOIA is evidence that agencies must comply with the statute's time limits for responding to requests. CREW, 711 F.3d at 190 ("If the Executive Branch does not like it or disagrees with Congress's judgment, it may so inform Congress and seek new legislation."). Where, as here, CBP has continually failed to comply with the time limits set forth in the FOIA, systemic relief is appropriate.

D. All Plaintiffs Have Standing to Bring a Pattern and Practice Suit.

Defendants' argument that all Plaintiffs lack standing to bring a pattern and practice claim under FOIA is entirely without merit. To establish standing, a plaintiff must demonstrate a concrete injury that is both fairly traceable to the challenged action of the defendant and likely to

be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Standing for class-wide declaratory and injunctive relief is determined at the time that the complaint is filed. Haro v. Sebelius, 747 F.3d 1099, 1108 (9th Cir. 2014) (citing Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 51 (1991)). A plaintiff is presumed to have standing to seek injunctive relief when he or she "is the direct object of [government] action challenged as unlawful." Los Angeles Haven Hospice v. Sebelius, 638 F.3d 644, 655 (9th Cir. 2011) (citing Lujan, 504 U.S. at 561-62). This presumption applies here; each Plaintiff has a pending FOIA request subject to CBP's pattern and practice—challenged here—of delaying responses to FOIA requests. Even without this presumption, however, all Plaintiffs clearly had standing at the time the suit was filed.

1. All Plaintiffs Have Standing As All Were Subject To An Ongoing, Concrete Injury At The Time That The Suit Was Filed.

All Plaintiffs satisfy the three Lujan requirements for standing. Defendants do not address—and thus do not dispute—the first two requirements: that, at the time of filing, each Plaintiff suffered an injury directly traceable to CBP's conduct. As detailed in the First Amended Complaint, when the suit was filed, all of Plaintiffs FOIA requests had been, and continued to be, subject to extensive delays by CBP. Thus, at that point, CBP had violated FOIA and improperly withheld requested documents. Gilmore, 33 F. Supp. 2d at 1187.

Each Non-attorney Plaintiff requires the information he or she requested to determine eligibility for lawful permanent residence or other immigration relief. Each Attorney Plaintiff requires the requested information to adequately represent his or her clients. Defendant CBP's delay in providing this information has stymied Plaintiffs' efforts to make critical decisions about, and move forward with, their own or their clients' immigration cases.[7] Accord Payne

[7] ECF 22 at ¶ 1; see also id. at ¶¶ 48, 51, 54, 57, 60, 63, 65, 69, 71, 73, 75, 77, 79, 81, 83, 85 (detailing the specific harm that each Plaintiff has suffered due to Defendants' delay); Second

Enterprises, 837 F.2d at 487 (recognizing that the agency's delay in providing documents "injured Payne's business …"). All Plaintiffs clearly meet the first two elements for standing.

Citing Payne Enterprises, Defendants erroneously challenge the standing of all Plaintiffs on the basis that none have alleged that he or she will file future FOIA requests. ECF 26 at 9. Contrary to Defendants' claim, however, Payne Enterprises addresses mootness, not standing. Specifically, the court addressed the agency's argument that the case was moot because—after the suit was filed—the plaintiff received the requested documents. 837 F.2d at 490. Standing was never an issue.[8] The other cases relied upon by Defendants are similarly inapposite. See ECF 26 at 11-12. In both Walsh v. Virginia, 400 F.3d 535, 536-37 (7th Cir. 2005) and Quick v. U.S. DOC, 775 F. Supp. 2d 174, 184 (D.D.C. 2011), the courts held that the plaintiffs' claims of delay were mooted when the agencies released the requested records while the cases were pending. The court in Quick additionally addressed the plaintiff's pattern and practice claim, concluding that, because the agency promptly contacted the plaintiff a week after receiving his FOIA request, and thereafter worked diligently with him to resolve technical and other issues related to his complex request, there was no evidence of delay in his own case and thus no evidence of a pattern and practice of such delay. Quick, 775 F. Supp. 2d at 186. In contrast, the thousands of requests in CBP's backlog—including those filed by Plaintiffs—and the agency's failure to acknowledge any obligation under the statute, amply demonstrate the pattern and practice challenged in the instant case.

Where, as here, a plaintiff alleges an ongoing injury at the time that the suit is filed, there

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Tolchin Dec. Exhs. G ¶ 11; H ¶ 12; I ¶ 12 (specifying that Attorney Plaintiffs will continue to file FOIA claims in the future); Fed. R. Civ. P. 10(c) (exhibits attached to the complaint are part of the complaint "for all purposes.").

[8] The Ninth Circuit recently differentiated between standing and mootness. See Valle del Sol, Inc. v. Whiting, 732 F.3d 1006, 1018 n.11 (9th Cir. 2013).

is no need to demonstrate future injury. This is true even in cases involving a request for injunctive relief. McLaughlin, 500 U.S. at 51, distinguished between a class complaint, like that presented here, alleging "a direct and current injury" and situations where the illegal governmental action "ceased altogether before the plaintiff filed his complaint[.]" The latter might lack standing for injunctive relief. However, as to the former: "Plainly, plaintiff's injury was at that moment [when the complaint was filed] capable of being redressed through injunctive relief" and standing was proper. Id.

The Ninth Circuit recently reiterated the rule of McLaughlin: "We consider whether the elements of Article III standing, as articulated in Lujan, were satisfied at the time the complaint was filed." Haro, 747 F.3d at 1108. Haro was a class action case seeking injunctive relief. The named plaintiff "suffered a modest but concrete fiscal injury" directly traceable to the challenged government action. Id. The injury was ongoing at the time the complaint was filed. Though later events remedied the injury, the named plaintiff had standing. Id. at 1108-09.

Thus, all Plaintiffs have standing because they were subject to an ongoing injury directly caused by CBP at the time that this suit was filed.

2. All Attorney Plaintiffs Have Standing Based Upon Their Own Injuries And Do Not Rely on Injury To Future Clients.

Defendants also err in challenging the standing of the Attorney Plaintiffs as premised only on speculative injuries to future clients. ECF 26 at 12. The Attorney Plaintiffs do not claim standing based upon the injuries to their clients—whether current or future—and thus do not seek to assert third party standing. Instead, each has standing because each has been injured in his or her own right. See e.g., Mayock v. Nelson, 938 F.2d 1006, 117 n.1 (9th Cir. 1991) (implicitly finding that attorney had standing to prosecute a pattern and practice FOIA suit based upon FOIA requests he had filed on behalf of his clients); Martins v. United States Citizenship & Immigration Servs., 962 F. Supp. 2d 1106, 1126 n.12 (N.D. Cal. 2013) (finding that an attorney

has standing to seek injunction under FOIA requiring disclosure of asylum interview notes). Here, the FAC makes clear that CBP's delays hinder the ability of each Attorney Plaintiff to effectively represent his or her clients. ECF 22 at ¶¶ 48, 51, 54, 57, 60.

E. This Court Has Jurisdiction to Address Allegations Challenging Defendants' Policy or Practice of Failing to Comply with 5 U.S.C. § 552(a)(6)(A)(I)

Finally, Defendants mistakenly argue that Plaintiffs have not adequately alleged a "pattern and practice claim . . . because they fail to challenge any discrete policy or practice of CBP." ECF 26 at 16-17. First, Defendants erroneously attempt to import a standard applicable to actions taken under the Administrative Procedures Act ("APA") where a party is challenging a failure to act. Defendants rely on a district court decision to assert that "judicial remedies in a FOIA pattern and practice case are subject to the same limits as suits under the APA." ECF 26 at 13 (citing Del Monte Fresh Produce N.A., Inc. v. United States, 706 F.Supp.2d 116, 120 (D.D.C. 2010)). However, in Del Monte, the court distinguished Payne, supra, precisely because it was brought under FOIA, rather than the APA. Id. Nowhere does the court pronounce that the standards for challenging a failure to act under the APA also apply to FOIA. This is because, unlike Del Monte, FOIA challenges are based on discrete actions specified by the statute. More importantly, even if the APA standard were applicable, Defendants' claim is without merit because Plaintiffs do indeed challenge a very discrete action that is specified under the statute. FOIA mandates that an agency issue a response within 20 business days of receiving a FOIA request. 5 U.S.C. § 552(a)(6)(A)(i). It is hard to imagine a challenge that addresses a more explicit statutory mandate.

Defendants rely on the Supreme Court's decision in Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 55 (2004), but again, that case provides no support for their position. ECF 26 at 19. In Norton, the plaintiffs sought to challenge the agency's failure to limit off-road vehicles in a designated wilderness study area. The Supreme Court clarified that a claim can only proceed where an agency fails to take a discrete agency action that is required by the statute. 542

U.S. at 62. However, the plaintiffs relied on a statute that provided only an objective to be achieved, not a means to do it, and certainly provided no specifications regarding limitations to off-road vehicles. Rather, the agency had discretion over how to best manage the specified statutory objective, protecting the designated wilderness areas. 542 U.S. at 65. Given that there was no statute requiring the agency to limit off-road vehicles, the Court was unwilling to replace the agency in making discretionary determinations on how to best manage the designated wilderness areas. Given this critical distinction between the present case and Norton, Defendants misstate the principle announced by the Court when it explained, "[i]f courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered . . . to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out . . . day-to-day management." ECF 26 at 19 (citing Norton, 542 U.S. at 66-67).

In contrast, in the instant case, FOIA clearly requires that an agency respond to FOIA requests within 20 business days, see 5 U.S.C. § 552(a)(6)(A)(i). Plaintiffs specifically allege that Defendants routinely fail to respond to FOIA requests within the statutory period. ECF 22 at ¶¶2-3, 41, 98-99. Plaintiffs allege an agency practice of disregarding the backlog which has led to individuals waiting, not only additional days, but additional *years* to receive any response. Id. at ¶¶ 61, 64, 66, 68, 70, 72, 74, 80, 84. Plaintiffs' claim points to a nondiscretionary duty that is readily ascertainable. Indeed, it is hard to imagine a more discrete agency action, failure to submit a response within the timeline imposed by Congress.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

Dated: June 1, 2015

Respectfully submitted,

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